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TEACHING ADMIRALTY REQUIRES DISMISSING IMPORTANT SUBJECTS

MARTIN J. DAVIES*

It is often thought, mistakenly, that admiralty and maritime law is a narrow area of specialization. Nothing could be further from the truth. Admiralty and maritime law are like the TARDIS in the long-running British television series, “Doctor Who”; it is much larger on the inside than it looks from the outside.¹ It is a broad and varied field, containing elements of contract, tort, property, civil procedure, constitutional, agency, and environmental law, as well as such *sui generis* concepts as salvage and general average, which have no land-based counterparts. As a result, teaching admiralty is rather like teaching world history in one semester. The main problem lies in deciding what to cover—or, rather, what to leave out. Tulane University Law School has the world’s largest range of law school courses in admiralty and maritime law.² The survey Admiralty courses at Tulane (imaginatively named Admiralty I and Admiralty II) occupy six credits³ but not even they cover the whole of admiralty and maritime law. Professors with fewer credits at their disposal

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1. *Doctor Who*, BBC, <http://www.bbc.co.uk/doctorwho/dw/characters/TARDIS> (last visited Feb. 24, 2011). Tardis stands for “Time and Relative Dimensions in Space,” Dr. Who’s time travel machine. *Id.* The Tardis appears from the outside to be a police telephone box. *Id.* Inside, it is like a large spacecraft. *Id.* The allusive use of the word Tardis is so common in the United Kingdom that the word was included in the Oxford English Dictionary in 2002, where the definition is: “Something resembling or likened to Doctor Who’s TARDIS; *spec.*: (a) a thing which has a larger capacity than its outward appearance suggests; a building, etc., that is larger on the inside than it appears from the outside; (b) a thing seemingly from another time (past or future).” OXFORD ENGLISH DICTIONARY (3d ed. 2002), *available at* <http://www.oed.com/viewdictionaryentry/Entry/247369> (last visited Feb. 24, 2011).

2. TULANE UNIV. LAW SCH., ADMIRALTY & MARITIME LAW 5 (2010), *available at* http://www.law.tulane.edu/uploadedFiles/Academic_Programs/TLS_Admiralty_Brochure.pdf [hereinafter TULANE ADMIRALTY PROGRAM].

3. *Admiralty I*, TULANE UNIV. LAW SCH., http://www.law.tulane.edu/tlsAcademicPrograms/courseDetail.aspx?id=1776&_taxonomyid=2 (last visited Feb. 24, 2011); *Admiralty II*, TULANE UNIV. LAW SCH., http://www.law.tulane.edu/tlsAcademicPrograms/courseDetail.aspx?id=1830&_taxonomyid=2 (last visited Feb. 24, 2011).

must therefore cope with another TARDIS: Teaching admiralty requires dismissing important subjects.⁴

Before exploring the question of what to teach and what not to teach, I should make some apparently pedantic but not completely pointless observations about the nature of admiralty and maritime law. The name of this symposium is “Teaching Admiralty,” so why the references to maritime law? In the United States, the terms “admiralty law” and “maritime law” are usually used as if they were synonymous,⁵ but strictly speaking, they are not. The Framers used both words in Article III, Section 2 of the Constitution: “The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.”⁶ The Supreme Court would have us believe that, “[I]n dealing with a subject as technical as the jurisdiction of the courts, the Framers, predominantly lawyers, used precise, differentiating and not redundant language.”⁷ Admiralty law and maritime law are two different things, despite the widespread American usage that treats them as synonyms.

Technically, admiralty law is the body of rules that define the scope of the court’s admiralty jurisdiction. Maritime law is the substantive law applied by a court exercising admiralty jurisdiction.⁸ The crazily confused (and confusing) test for what makes a tort a maritime tort⁹ and the Delphically-simple but vague test for what makes a contract a maritime contract¹⁰ are part of admiralty

4. I thank Erinn Martins for coming up with the title of this paper, which fits so well with my theme and my quest to make the Dr. Who joke extend to the title, having been given the first two words by the symposium organizers. That quest brings to mind another recent addition to the Oxford English Dictionary: “Anorak: A boring, studious, or socially inept young person (caricatured as typically wearing an anorak), *esp.* one who pursues an unfashionable and solitary interest with obsessive dedication.” 3 OXFORD ENGLISH DICTIONARY ADDITIONS SERIES 54 (John Simpson gen. ed., Michael Proffitt ed., 1997). Except that I am no longer young.

5. The opening words of Grant Gilmore and Charles Black’s celebrated treatise on admiralty law are: “The law of admiralty, or maritime law.” GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 1 (2d ed. 1975).

6. U.S. CONST. art. III, § 2.

7. *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 364 (1959).

8. Thus, the Framers were not quite so precise after all: there is no such thing as “maritime jurisdiction.”

9. The four Supreme Court cases on the tort jurisdiction, *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995); *Sisson v. Ruby*, 497 U.S. 358 (1990); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982); and *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), epitomize the old adage “hard cases make bad law.” It has been suggested that one reason for the test becoming “uselessly more baroque” is “Clerks’ Work Lacks Continuity.” David W. Robertson, *Summertime Sailing and the U.S. Supreme Court: The Need for a National Admiralty Court*, 29 J. MAR. L. & COM. 275, 296 (1998).

10. The test for the boundaries of admiralty jurisdiction over contracts is “conceptual rather than spatial”—does the contract have “reference to maritime service or maritime transactions?” *Norfolk S. Ry. Co. v. Kirby, Pty Ltd.*, 543 U.S. 14, 23–24 (2004) (quoting *N. Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 125 (1919)).

law in the technical sense, as they deal with what cases may be brought in the court's admiralty jurisdiction. Joint and several liability for concurrent tortfeasors¹¹ and pure comparative fault¹² are part of maritime law, substantive rules that are applied within the court's admiralty jurisdiction.

Maritime law is federal law—federal common law, at that,¹³ although “common law” is another imprecise usage in this context. The judge-made law applied in the admiralty jurisdiction is and always has been called general maritime law, not “common law.” The federal courts' power to make this species of federal “common law” stems from the Constitution's grant of admiralty jurisdiction, although some commentators have argued (brilliantly, but without any impact on the Supreme Court's opinion)¹⁴ that admiralty's special constitutional status cannot be justified and that by making general maritime law, admiralty judges are usurping the role of state law.¹⁵ Indeed, although general maritime law is federal in the sense that it is supposed to be uniform throughout the country, it is (in theory at least) what the Supreme Court has referred to as “a non-national or international maritime law of impressive maturity and universality.”¹⁶ In theory, maritime law is not federal law made by the United States (or its courts) as a federation. Federal courts supposedly “accept” transnational maritime law and apply it to the cases before them.¹⁷ As Chief Justice John Marshall observed in *American Insurance Co. v. 356 Bales of Cotton*: “A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law admiralty and maritime, as it existed for ages, is applied by our Courts to the cases as they arise.”¹⁸ Similarly, in *The Lottawanna*, the Supreme Court described the relationship between transnational maritime law and its domestic application as follows:

[I]t is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the

11. *E.g.*, *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 220–21 (1994).

12. *E.g.*, *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975).

13. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 483 (2008) (“[M]aritime law remains federal common law, . . .”).

14. *Norfolk S. Ry. Co.*, 543 U.S. at 23 (“Our authority to make decisional law for the interpretation of maritime contracts stems from the Constitution's grant of admiralty jurisdiction to federal courts.”). This statement was made after publication of the scholarly writings referred to in note 15, *infra*.

15. MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 98–99 (1980); Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469 (2004).

16. *Lauritzen v. Larsen*, 345 U.S. 571, 581 (1953).

17. *Id.* at 581–82.

18. *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 512 (1828).

effect of law in no country any further than they are accepted and received as such; . . .¹⁹

The idea that maritime law exists “out there” somewhere and is “adopted into” American law was too much for the proto-realist Oliver Wendell Holmes. It was that notion that gave rise to Holmes’s two famous protesting statements, “There is no mystic over-law to which even the United States must bow,”²⁰ and “The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified; . . .”²¹ These quotations are well known, but what is perhaps less well known or less often remembered is the fact that they were both written in maritime cases in an attempt to describe the relationship between transnational maritime law and federal United States law. Taken out of context in “sound bite” form as quoted above, they give the impression that Holmes thought that there was no such thing as a transnational maritime law that could exist separately from the laws of the United States, no matter what the Constitution and John Marshall might say. Taken in context, however, they do no more than express the view that a rule or principle taken from the transnational “general maritime law” can only properly be called *law* when it has been adopted as part of national law. A fuller quotation from *The Western Maid* makes this clear and shows that Holmes’s view was not so far from that expressed in *356 Bales of Cotton* and *The Lottawanna*:

In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules.²²

Dubious jurisprudence aside, the fact remains that the intensely international character of maritime law is one of its great attractions for students, a theme to which I will return shortly. Before doing so, however, our excursion into the precise use of terminology has now put us in a position to return to our central question of what to leave out when teaching admiralty. Most courses entitled Admiralty Law cover material about the scope of the admiralty jurisdiction, federalism issues, the distinctive admiralty procedures of arrest and attachment, and the law relating to maritime liens. That is all admiralty law in the narrow, technical sense. The difficult choice lies in

19. *The Lottawanna*, 88 U.S. (21 Wall.) 558, 572 (1874).

20. *The Western Maid*, 257 U.S. 419, 432 (1922).

21. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917).

22. *The Western Maid*, 257 U.S. at 432.

deciding what *maritime* law topics should be included. The names of the upper-level electives in Tulane's program give some indication of the breadth of subject matter that falls under the general rubric of maritime law: Carriage of Goods by Sea; Charter Parties; Collisions and Limitation of Liability; Flagging, Vessel Documentation and Finance; Freight Forwarders, Shipbrokers and NVOCCs—Intermediaries and the Carriage of Goods by Sea; Marine Insurance I; Marine Insurance II; Marine Pollution; Personal Injury and Death; Regulation of Shipping; Salvage; Towage and Offshore Services.²³ Not even this list covers the whole field. Recreational boating law, the law relating to passenger ships, and the law relating to fisheries also fall within the broad rubric of maritime law.

A two or three credit course entitled "Admiralty Law" could try to cover as many of these topics as possible, but it would only do so at a very superficial level. One alternative is to teach what is essentially a torts-based course, covering the purely admiralty material plus the substantive law of maritime personal injury and death. Another alternative is to teach what is essentially a contract-based course, covering the purely admiralty material plus the substantive law of carriage of goods by sea, including (if time permits) charter parties. A more exotic alternative might be to teach purely admiralty material plus uniquely maritime concepts, like salvage (including treasure salvage) and general average.

A more intriguing alternative would be not to teach admiralty law at all, but to teach only maritime law.²⁴ Admiralty law is complex and difficult, and its focus on jurisdiction and procedure makes it attractive mainly to those who have some interest in practicing in the field. Maritime law is both international and (mostly) commercial, two qualities that students generally find both interesting and attractive. What is more, there are successful precedents for teaching only maritime law. Despite its name, the three-credit Admiralty I course at Tulane covers only maritime law: carriage of goods by sea, charter parties, personal injury and death, collisions, and (sometimes) towage, pilotage, and salvage.²⁵ The purely admiralty material is covered in Admiralty II: admiralty jurisdiction and procedure, federalism and admiralty jurisdiction, arrest and attachment, maritime liens, and also limitation of liability (itself largely a reverse forum shopping device), general average, and governmental

23. TULANE ADMIRALTY PROGRAM, *supra* note 2, at 3. Admiralty I and Admiralty II are prerequisites for all of the listed courses, except for LL.M. in Admiralty students. *Admiralty I*, *supra* note 3; *Admiralty II*, *supra* note 3. Thus, the listed courses can only be taken by 3L students. Admiralty I and Admiralty II are populated principally, but not exclusively, by 2Ls. See also *Course Descriptions*, TULANE UNIV. LAW SCH., <http://www.law.tulane.edu/tlsAcademicPrograms/courseDetail.aspx?id=1936&terms=course%20descriptions> (last visited Feb. 24, 2011).

24. Perhaps admiralty law would then be given the space it deserves in Federal Courts courses.

25. *Admiralty I*, *supra* note 3.

immunities.²⁶ Far more students take Admiralty I than Admiralty II. Admiralty II is taken mainly by students who want to go on to specialize in admiralty and maritime law by taking the upper level courses listed above. Those who want to take only one class out of general interest usually take Admiralty I. In other words, they study only maritime law. It is quite possible to understand substantive maritime law without understanding the arcana of admiralty jurisdiction and procedure.

Maritime law has a strong international component, given the nature of the shipping business. Should there be arbitration in Japan about a shipment of oranges and lemons from Morocco to Massachusetts?²⁷ Should an American presumption about causation (the *Pennsylvania* rule) apply to a collision in the English Channel between a Bahamian ship and a Norwegian ship while trying to avoid a Singaporean ship?²⁸ Should a plaintiff be allowed to seek a *forum non conveniens* dismissal of its own limitation proceedings brought to ward off multiple actions brought in the United States after a collision in Chinese territorial waters between a Dutch-owned dredge chartered to a Chinese company and a Panamanian-flagged ship chartered to a Swiss shipping line?²⁹ Should a time charterer be required to continue to pay hire for the use of a ship while it is taken hostage by Somali pirates?³⁰ What law should apply to the deaths on the high seas of eleven men on a vessel flagged in the Marshall Islands but connected by a drilling shaft to the Outer Continental Shelf?³¹

In dealing with maritime law questions of this kind, students are exposed to many of the standard techniques used in transnational litigation of all kinds.

26. See *Admiralty II*, *supra* note 3.

27. *Vimar Seguros y Reaseguros, S.A. v. M.V. Sky Reefer*, 515 U.S. 528, 530 (1995). The answer was Yes. *Id.*

28. *Otal Invs. Ltd. v. M.V. Clary*, 494 F.3d 40, 47–48, 50 (2d Cir. 2007). The answer was No. *Id.* at 52.

29. *In re Compania Naviera Joanna S.A. v. Koninklijke Boskalis Westminster N.V.*, 569 F.3d 189, 192 (4th Cir. 2009). The answer was Yes. *Id.*

30. *Cosco Bulk Carrier Co. v. Team-Up Owning Co. (The Saldanha)*, [2010] EWHC (Comm) 1340, [2] (Eng.). The answer was Yes. *Id.* at [35]–[39].

31. See *United States v. BP Exploration & Prod., Inc.*, No. 2:10-cv-04536-CJB-SS (E.D. La. Dec. 15, 2010). The mobile offshore drilling unit *Deepwater Horizon* was flagged in the Marshall Islands. Memorandum from the Comm. on Transp. & Infrastructure Staff to Members of the Comm. on Transp. and Infrastructure, Hearings on “*Deepwater Horizon: Oil Spill Prevention and Response Measures and Natural Resource Impacts*” 2 (May 17, 2010) [hereinafter Memorandum: *Deepwater Horizon*], available at http://coast.cms.udel.edu/DeepwaterDrillRiskyDecision/1432_DeepwaterHorizonHearing.pdf. It sank forty-one nautical miles off the coast of Louisiana, in international waters. Press Release, Transocean Inc., Transocean Ltd. Reports Fire on Semisubmersible Drilling Rig *Deepwater Horizon* (Apr. 21, 2010), available at <http://www.deepwater.com/fw/main/Transocean-Ltd-Reports-Fire-on-Semisubmersible-Drilling-Rig-Deepwater-Horizon-448C936.html?LayoutID=46>. At the time, it was still connected by the drill shaft to the well on the sea-bed. Memorandum: *Deepwater Horizon*, *supra*, at 2–3, 6.

How can jurisdiction be established? Will the court retain jurisdiction or dismiss in favor of litigation or arbitration elsewhere in the world? What law should the court apply? If the relevant law is foreign, how is it to be established?³² How can evidence be obtained from outside the country and presented to the court in comprehensible fashion? These are increasingly the questions raised in twenty-first century litigation practice in all kinds of commercial areas, but for many students, their admiralty law class may be the first time in their law school career that they encounter them. As well, students will encounter international conventions like the Hague Rules³³ and (soon, perhaps) the Rotterdam Rules,³⁴ and will learn some of the practical reasons for international uniformity of laws. They may encounter foreign materials, too. For example, if they study the law of charter parties, students will read many English decisions.³⁵ Is a port or berth safe for the chartered ship that has been sent there? Arbitrators in New York³⁶ agree with judges in London that the test for safety is to be found in the English decision *The Eastern City*.³⁷

Teaching Admiralty is fun because of the endlessly varied and colorful subject matter of *maritime* law. Any subject in which the appellee before the Supreme Court of the United States can be 356 bales of cotton has got something interesting and unusual going on. There really are cases about pirates,³⁸ sunken galleons³⁹ and even the *Titanic*, both after it sank⁴⁰ and after

32. An entertaining and vigorous debate on this question can be read in the separate opinions of Judges Easterbrook, Posner, and Wood in *Bodum*. *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624 (7th Cir. 2010).

33. Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155, implemented by the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 30701 (2006).

34. UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA (ROTTERDAM RULES), Sept. 23, 2009, G.A. Res. 63/122, U.N. Doc. A/RES/63/122, U.N. Sales No. E.09.V.9 (2009). The United States has signed but not yet ratified the Rotterdam Rules. U.N. Comm'n on Int'l Trade Law, *Status 2008-United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea-the "Rotterdam Rules"*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html (last visited Feb. 24, 2011).

35. *Admiralty: Chartered Parties*, TULANE UNIV. LAW SCH., http://www.law.tulane.edu/tls/AcademicPrograms/courseDetail.aspx?id=1834&_taxonomyid=2 (last visited Feb. 24, 2011).

36. See, e.g., *M.V. Atl. Bulker v. Babun Bulk Shipping Corp.*, S.M.A. No. 3938 4361, 4362 (2006) (Berg et al., Arbs.); *M.V. Bahama Spirit v. Martin Marietta Materials, Inc.*, S.M.A. No. 3849 3906, 3909 (2004) (Berg et al., Arbs.); *M.V. Star B v. Associated Transp. Line, LLC*, S.M.A. No. 3813 3714, 3717 (2003) (Arnold et al., Arbs.). These are just a few of many examples of New York arbitral tribunals applying *The Eastern City*.

37. *Leeds Shipping Co. Ltd. v. Société Française Bunge (The Eastern City)*, [1958] 2 Lloyd's Rep. 127, 131 (Sellers, L.J.) (Eng.).

38. See *Cosco Bulk Carrier Co. v. Team-Up Owning Co. (The Saldanha)*, [2010] EWHC (Comm) 1340 (Eng.).

its wreck was found at the bottom of the Atlantic.⁴¹ The subject is not just about the curious and exotic, though. It is about an indispensable part of the world's economy, the vehicle by which most international trade in goods is done. The secret to teaching Admiralty may be to teach more maritime law and less admiralty law—or perhaps even none.

39. *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978) (the galleon *Nuestra Senora de Atocha*); *Odyssey Marine Exploration, Inc. v. Unidentified, Wrecked, & Abandoned Sailing Vessel*, 727 F. Supp. 2d 1341 (M.D. Fla. 2010) (ship *Le Marquis de Tournay*).

40. *Oceanic Steam Navigation Co. v. Mellor*, 233 U.S. 718 (1914).

41. *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 286 F.3d 194 (4th Cir. 2002); *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943 (4th Cir. 1999); *Marex Titanic, Inc. v. Wrecked & Abandoned Vessel*, 2 F.3d 544 (4th Cir. 1993); *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 327 F. Supp. 2d 664 (E.D. Va. 2004).